IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12291 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THE CHAIRMAN/SECREARY

Versus

PATEL TUSHAR MAGANLAL

Appearance:

MR KIRIT I PATEL for Petitioner Nos. 1-2

NANAVATY ADVOCATES for Respondent No. 1

Mr.I.M. Pandya, Assistant GOVERNMENT PLEADER, for Respondent No. 2

..... for Respondent No. 3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 06/08/2003

ORAL JUDGEMENT

1. Rule. With the consent of the parties, the matter is taken up for final hearing hearing today.

2. By filing this petition, the petitioner-Management has challenged the order passed by the Tribunal at Annexure `F', in Application No.18 of 2002. By the impugned order, the Tribunal has granted interim mandatory order, by which the respondent-Lecturer is ordered to be continued in service initially upto 31.7.2002. The Court is informed that, by another order dated 5.12.2002, the said interim relief granted earlier is continued till the decision of the main Application. It is not in dispute that the main application is still pending. The respondent No.1 herein was appointed as a Lecturer in the college by an order dated 17.7.2000 on probation for a period of two years. Thereafter, by order dated 15.4.2002, his services were terminated, to be effective from 15th May, 2002. The said order is passed during the period when the respondent was on probation. The said order was challenged by the respondent No.1 by way of an application before the Gujarat Affiliated Colleges Services Tribunal, being Application No.18 of 2002. The Tribunal initially granted ad interim mandatory order, by which the respondent was allowed to be continued as Lecturer and, subsequently, after hearing both the sides, the said order was confirmed. The said order is under challenge at the instance of the petitioner-Management.

3. Mr.Patel, who is appearing for the petitioner-Management, submitted that the Tribunal has committed grave error of law and of jurisdiction in passing the mandatory order, restoring respondent No.1 back in service. Respondent No.1 was on probation and since during the probationary period, his services were not satisfactory, ultimately, the termination order was passed. He submitted that the Management has also produced certain documentary evidence before the Tribunal, pointing out that his work was not satisfactory, and, according to him, therefore, respondent No.1, who was on probation, had no right to the post and, it is always open for the Management to terminate the services if the services of the probationer are not satisfactory. He submitted that, in any case, once termination order is passed by the Management, such type of interim order is not required to be passed, as it is mandatory in nature. He also submitted that in case the petitioners succeed before the Tribunal, it will not be possible for the petitioners to recover any salary for the intervening period, as, respondent No.1 may claim

salary on the basis of quantum meruit for the interim period. He also submitted that if the respondent No.1 succeeds, ultimately, consequential order can always be passed by the Tribunal. He also further submitted that on the principle of balance of convenience, such interim relief could not have been passed.

4. Ms.Nanavati, learned Advocate, who is appearing for the respondent-Lecturer, however, contended that, in the impugned order, there is no mention that, in view of the unsatisfactory work of respondent No.1 during the probation period, his services are terminated. She submitted that the order in question is a penal order and, therefore, without holding appropriate enquiry, it was not open for the Management to terminate his services. She has placed strong reliance on the wordings in the termination order, wherein, according to her, there is no reference that, in view of the unsatisfactory work during probationary period, his services are put to an end. She submitted that, as such, the order in question is penal in nature and, therefore, even if a person is on probation, he cannot be removed without holding enquiry, if, in substance, such termination is under the guise of disciplinary action.

5. I have heard learned Advocates of both the sides, in detail. Whether the order in question is penal in nature or whether it is simpliciter discharge or termination of a probationer on unsatisfactory work is the question which is at large before the Tribunal. Since the matter is pending before the Tribunal, this Court would not like to express any opinion, as, it is for the Tribunal to decide the question after considering the evidence on record. However, the impugned order deserves to be set aside on a different ground. It is not in dispute that at the time when the Tribunal granted interim relief after hearing both the sides, respondent No.1 was already out of service. Even if an applicant may have a strong prima facie case, that itself is not enough for granting such type of mandatory order. It is required to be noted that if a person, approaching the Tribunal, succeeds, naturally, he can be compensated adequately by appropriate back wages for the intervening period by passing consequential orders in this regard. As against that, in case the concerned person fails before the Tribunal finally and if he is continued in service by way of interim relief, then, it would be difficult to remedy such a situation because if a person is allowed to work, by virtue of the interim order of the Court, even on the principle of quantum meruit, normally, he cannot be asked to pay back the salary for the

intervening period. Even otherwise, in this case, the Tribunal has not stated that in case the petitioners herein succeed, respondent No.1 will have to pay back the amount to the petitioner-Management. Under the circumstances, when the Court grants mandatory order of such nature, the question of balance of convenience is required to be decided in an appropriate manner. In such situation, the Court should normally take such matters for hearing at the earliest for disposing of the entire matter finally. Considering this aspect of the matter, unless strong exceptions are made out, court should not grant such amendatory order, reinstating the person in service till the entire dispute is adjudicated appropriately. Ultimately, after appreciating the evidence on record, if the Court comes to the conclusion that the order of termination is bad in law, the Court can certainly pass consequential orders even for the intervening period, during which such person remained out of service. Considering the aforesaid aspect of the matter, in my view, the Tribunal has not considered this aspect properly and it cannot be said that even if the applicant before the Tribunal succeeds, he cannot be adequately compensated by way of consequential orders. As pointed out earlier, in case the petitioners herein succeed, then, naturally, whatever payment made by them to respondent No.1 towards salary in view of the interim order, it would be very difficult or practically impossible for the petitioners to recover the said amount. Keeping this aspect in mind, when the services of respondent No.1 were already terminated, no interim relief should have been granted by the Tribunal, and, instead, the Tribunal should have adjudicated the entire matter finally.

6. In that view of the matter, without expressing any opinion on the first point whether the order in question is a simpliciter termination order of a probationer or otherwise, the interim order is set aside on the aforesaid grounds, as discussed above. The Tribunal shall take up this matter immediately for final hearing and is directed to decide the same as early as possible, and, latest by 31st December, 2003. It is once again clarified that on the first point, this Court has not expressed any opinion and the Tribunal shall decide the same after appreciating the evidence on record. The petition is accordingly allowed. The impugned order is accordingly quashed and set aside. Rule is made absolute accordingly, with no order as to costs.

6th August, 2003 (P.B. Majmudar, J.)

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(apj)